IN THE COURT OF APPEAL, FIJI
Appellate Jurisdiction

CRIMINAL APPEAL NO. AAU 43 OF 2022
High Court No. 164 of 2020S

BETWEEN	:	**ILAISA BALEKANA**
		Appellant
AND	:	**THE STATE**
		Respondent
Counsel	:	**Mr. Fesaitu M. and Mr. Veibataki E. for Appellant**
		Mr. Kumar. R for Respondent
Coram	:	**Mataitoga, RJA**
Date of Hearing	:	**23 April, 2024**
Date of Ruling	:	**4 June 2024**

RULING

1. The appellant (Ilaisa Balekana) was charged with two counts of Rape contrary to section 207(1) (2) (a) of the Crimes Act 2009. The information set out the charges as follows:

Count I

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009.

Particulars of Offence

ILAISA BALEKANA on the 9th day of June 2019 at Babavoce Settlement in the Eastern Division had carnal knowledge of M.T.L.S without her consent.

Count 2

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (b) of the Crimes Act 2009.

Particulars of Offence

ILAISA BALEKANA on the 9th day of June 2019 at Babavoce Settlement in the Eastern Division penetrated the vulva of M.T.L.S with his tongue without her consent."

2. Following his conviction on 3 May 2022, the appellant was sentenced to 12 years imprisonment for each of the count of Rape charged, to be served concurrently. The final sentence was 12 years imprisonment with a non-parole period of 11 years imprisonment.

3. The brief facts was outlined in sentence ruling in the High Court, were as follows. The complainant was born on 5 April 2003. On 9 June 2019, she was 16 years old and was a Form 5 student at a secondary school in Narere. She resided with her parents at a village in Tailevu. The accused was 49 years old, married with four children aged between 22 to 13 years old. He was a security officer and also runs a car business. The accused and the female complainant attend the same church in Tailevu.

4. On 9 June 2019, the female complainant and her family went to attend a church gathering after 6.30 pm. During the church service, the female complainant went out in the accused's car to drop off some washed clothing to their house in the village. The accused was driving the car. Later, the two went to the accused's residence to get a spare tyre. After getting the tyre, the accused parked the car in a secluded spot next to his residence.

5. He then told the complainant to go to the back seat of his car. She did so. He followed her, and opened the car door next to her. He told her he wanted to have sex with her. The complainant refused. He then forced himself on her by licking her vagina and penetrating her vulva with his tongue (count no. 2). Later, he inserted his penis into her vagina, without her consent, well knowing she was not consenting to the same, at the time (count no. 1). On 17 June 2019, the complainant reported the above to her teachers, and later on 18 June 2019, it was reported to police.

The Appeal

6. On 1 June 2022 the appellant filed a Notice of Leave to Appeal against conviction. He was given 30 days to appeal his conviction. He filed his Notice of Leave to appeal on 1 June 2022.The appeal was timely.

7. This Notice for Leave to appeal was amended pursuant to court filing made by the Legal Aid Commission [LAC] on behalf of the appellant, filed in the court registry on 11 August 2023.

8. At the hearing of this matter on 23 April 2024, it was confirmed by counsel for LAC, that the one (1) ground of appeal set out in the amended Notice is the only ground submitted on behalf of the appellant.

9. The sole ground of appeal is:

> *'The learned Trial Judge had erred in law and facts having not independently assessed the totality of the evidence when deciding on the verdict which is not supported by the evidence and is unreasonable resulting in miscarriage of justice.'*

10. This leave to appeal application is governed by section 21(1)(b) of the Court of Appeal Act 2009, given that the ground for appeal claim and error of law and fact by the trial judge.

11. In **Levula v State** [2023] FJCA 267; AAU44.2019 (29 November 2023) at paragraph 7 states:

> *"In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. The test for leave to appeal is 'reasonable prospect of success': **Caucau v State** [2018] FJCA 171, **Sadrugu v The State** [2019] FJCA 87 and **Waqasaqa v State** [2019] FJCA 144."*

Appeal not Untimely

12. The submission by the respondent that the Appellant's leave application was untimely by 18 days was incorrect. The appellant by letter dated 1 June 2022 file his initial Notice to appeal which was received in the court registry on 2 June 2022.

Review of the Judgement

13. In the High Court the trial Judge at paragraph 10 – 12 of the judgement stated the reasoning for his finding the appellant guilty, in addition to matters covered by the Agreed Facts, as follows:

> *"10. She said, she told the accused she could not take it any longer and she said, she was crying. She said, he stopped and then stood up. She said, she saw him taking his penis out of his ¾ pants. She said, she tried to pull up her panty while facing the back seat of the car, from the opened door. She said, the accused suddenly pushed her into the car and she fell on the back seat on her stomach. She said, he was holding both her hands from the back. She said, he then inserted his penis into her vagina from the back, and then moved his penis in and out of her vagina for about 5 minutes. She said, she felt pain in her vagina and shouted for help. She said, the accused blocked her mouth with one hand and told her to shut up. She said, she then started crying. She said, both her legs were hanging out of the car. She said, she later kicked the accused. She said, she did not consent to the accused inserting his tongue into her vulva, and neither did she consent to him inserting his penis into her vagina, at the material time. That was basically the prosecution's case on the two rape allegations in count no. 1 and 2.*
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> *11. A prima facie case was found against the accused and he chose to give sworn evidence in his defence. He did not deny penetrating the complainant's vulva with his tongue, at the material time. He also did not deny penetrating the complainant's vagina with his penis, at the material time. In fact, he admitted the above in paragraphs 3 and 4 of the "Agreed Facts", dated 27 April 2022. He admitted he was 49 years old at the time, while the complainant was 16 years old, at the time. In his defence, he appeared to say that the complaint consented to him inserting his tongue into her vulva, and inserting his penis into her vagina, at the material time.*
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> *12. The court had carefully listened to the complainant's evidence, and had also carefully listened to the accused's evidence. The court had also carefully examined and considered their demeanour, while they were giving evidence in court. The age difference between the two was 33 years. The complainant was young enough to be his daughter. When cross examined by the prosecution, the accused admitted it was morally wrong for him to have sex with the complainant. He said, the complainant was much younger than him, and he admitted what he did to the complainant was not right. After carefully comparing the complainant and the accused's evidence, I find the complainant to be a*

credible witness, and I accept her evidence and version of events. I find the accused not to be a credible witness, and I reject his version that the complainant consented to the sexual acts on count no. 1 and 2."

14. There are a few issues of concern raised by the judgement in question, these are:

i) The reliance on the demeanour of a witness as the basis of accepting the complainant evidence against the evidence of the appellant is inadequate given that this was a case in which the complainant's evidence on the issue of consent was mitigated by the evidence of the appellant.

ii) In paragraph 12 of the Judgement the reliance by the trial Judge on moral grounds at this stage of the trial, without reference to the legal basis for such a finding may be irrelevant.

iii) *The only issue at the trial was whether there was 'çonsent' and therefore the issue of delayed complaint is critical in evaluating the circumstances that may or may not give rise to consent. This issue was not addressed in the court's judgement.'*

15. In evaluating paragraph 14 i) and ii) above, the following guidelines on the danger of using 'demeanour' as a basis of accepting the credibility of one witness against the other, was discussed by the Court of Appeal in Dauvucu & Others v State [2024] FJCA (AAU 0152 of 2019) as follows:

"Demeanour

Primary reliance on demeanour is a cause for concern. Substantial research in numerous jurisdictions has found that demeanour is not a reliable indication of the truthfulness of a witness. For instance, in New Zealand jurisprudence reflecting the position there and in England, the topic has been considered in the following terms:

(i) From the Court of Appeal in E v R [2013 NZCA 678 (CA799/2012)

"[23] It is trite that our criminal justice system depends essentially on oral testimony. The jury plays a critical part as the sole judge of all factual issues arising in a trial. A critical part of that task is the assessment of the credibility and reliability of witnesses. This can be a difficult task and it is therefore vital that any directions given by Judges on these topics should be carefully considered and adapted as necessary in the light of any soundly-based research on this topic.

[24] We start our discussion by a consideration of what constitutes demeanour. Writing extra-judicially, Lord Bingham has described demeanour as:

> *... [the witness's] conduct, manner, bearing, behaviour, delivery, inflexion; in short, anything which characterises [the witness's] mode of giving evidence but does not appear in a transcript of what [the witness] actually said.*

[25] We add that demeanour also includes the personality or character of a witness. Given the breadth of what may be embraced by the concept of demeanour, we do not think it helpful to speak of "body language" as some traditional jury directions have done.

[26] Lord Bingham went on to refer to passages from observations made by three experienced trial judges. We will refer to two of them. First, Lord Devlin has said:

> *The great virtue of the English trial is usually said to be the opportunity it gives to the judge to tell from the demeanour of the witness whether or not he is telling the truth. I think that this is overrated. It is the tableau that constitutes the big advantage, the text with illustrations, rather than the demeanour of a particular witness.*

[27] Second, the observations of Mr Justice MacKenna:

> *I question whether the respect given to our findings of fact based on the demeanour of the witness is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is it the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground, perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help.*

[28] Lord Bingham went on to refer to the additional difficulties of assessing credibility of a witness giving evidence through an interpreter. He concluded:

> *To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm."*

16. By simply relying on demeanour without further elaboration of issues such as whether there was recent complaint and the medical report if any, that may assist the court in assessing the totality of the evidence, maybe inadequate and unfair. However, at this stage of the criminal appeal process I do not have all records from the trial in the High

Court, to make a more focussed assessment of the evidence. This would be available in the full court hearing.

17. The appellant through counsel argues that instead of undertaking an evaluation and assessment of the totality of the evidence, the trial judge at paragraph 12 of the judgement had focused on morality of the appellant's action in determining whether the prosecution had established the case against him beyond reasonable doubt. On that basis it cannot be said that the trial judge provided adequate reasons for finding the appellant guilty as charged.

18. The Court in ***Bala v State*** *[2023] FJCA 279; AAU21.2022 (18 December 2023) and Prasad v State [2023] FJCA 280; AAU45.2022 (18 December 2023) held as follows.*

> *'Therefore, while it goes without saying that the giving of adequate reasons lies at the heart of the judicial process and therefore a duty to give reasons exists, the scope of that duty is not to be determined by any hard and fast rules. Broadly speaking, reasons should be sufficiently intelligible to permit appellate review of the correctness of the decision and the requirement of reasons is tied to their purpose and the purpose varies with the context. Trial judge's reasons should not be so 'generic' as to be no reasons at all but they need not be the equivalent of a jury instruction or summing-up to the assessors. Not every failure or deficiency in the reasons provides a ground of appeal, for the appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in that case for a new trial.'*

19. The challenge in the judgement under review in this leave hearing, is that it does not explain clearly why the victim's evidence is to believed against that of the appellant. It focusses on 'demeanour' of the victim and reliance on a few generic reasons which are broad, to support the finding. This aspect of the case needs to be revisited in light of the full record of the trial court.

20. I am satisfied that leave should be granted, to ensure there is no miscarriage of justice and to give the full court the opportunity to review the issues I have raised and the others issues raised by the appellant in their leave to appeal submission.

ORDERS

(1) Leave to appeal against conviction is allowed

Isikeli U Mataitoga

Acting President / Resident Justice of Appeal